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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 618

ALABAMA POWER COMPANY, PETITIONER

v.

ALABAMA ELECTRIC COOPERATIVE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENTS RURAL ELECTRIFICATION ADMINISTRATION, NORMAN M. CLAPP, UNITED STATES DEPARTMENT OF AGRICULTURE AND ORVILLE L. FREEMAN

OPINIONS BELOW

The opinion of the district court (Pet. App. 47a–57a) is reported at 249 F. Supp. 855. The opinion of the court of appeals (Pet. App. 1a–44a) is reported at 394 F. 2d 672.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1968. A timely petition for rehearing was denied on July 11, 1968. The petition for a writ of certiorari was filed on October 8, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the federal antitrust laws apply to the action of the Rural Electrification Administrator in requiring, as a condition to making a loan to a federated rural electric cooperative, that the members of the cooperative agree to purchase from the cooperative all the power they need during the thirty-five year period in which the loan is to be repaid.

STATUTE INVOLVED

Section 4 of the Rural Electrification Act of 1936, 7 U.S.C. 904, provides in pertinent part:

> The Administrator is authorized and empowered, from the sums hereinbefore authorized, to make loans for rural electrification to persons, corporations, * * * for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service * * *. Such loans shall be on such terms and conditions relating to the expenditure of the moneys loaned and the security therefor as the Administrator shall determine and may be made payable in whole or in part out of the income; *Provided, further,* That all such loans shall be self-liquidating within a period of not to exceed thirty-five years, and shall bear interest at the rate of 2 per centum per annum * * *.

STATEMENT

On October 31, 1961, the respondent Clapp, Administrator of the Rural Electrification Administration ("REA"), approved a proposed loan of $20,350,000 to finance the construction of a generating plant and transmission lines by the respondent Alabama Electric Cooperative, Inc. ("AEC"), a federated cooperative composed primarily of several member distribution cooperatives. When completed, the facilities will provide electric power at wholesale rates to AEC's member cooperatives who, in turn, will distribute the power to their member consumers in rural areas of Alabama. The REA Administrator approved the loan because (1) it would result in power costs to the cooperative and its members lower than those which they would otherwise incur by purchases at wholesale from the petitioner, Alabama Power Company, and another private power company; and (2) the loan would protect the effectiveness and security of AEC and its members against petitioner's efforts to deprive them of existing and potential consumers in their service areas (R. 224–226).[1] The Administrator conditioned the loan, however, on AEC obtaining from its members agreements that they would purchase all their wholesale power requirements from AEC during the 35-year period of the loan.

The Alabama Department of Finance and the Alabama Supreme Court approved AEC's proposed con-

[1] "R." refers to volume I of the Transcript of Record, a copy of which has been lodged with the Clerk of this Court.

struction and its financing (Pet. App. 51a–52a). Petitioner brought this action in the United States district court to enjoin the proposed REA loan, contending, *inter alia*, that compliance with the provisions of the loan agreement[2] would violate the federal antitrust laws because of the requirement that the members of AEC purchase all their wholesale power requirements from it during the 35-year duration of the loan (R. 10–13.)[3]

The district court denied petitioner's motion for a preliminary injunction, and granted the government's motions to dismiss (Pet. App. 47a–59a). The court of appeals affirmed, Judge Godbold dissenting (Pet. App. 1a–46a).

ARGUMENT

1. The court below correctly concluded (Pet. App. 6a) that the complaint did not state a cause of action against the REA Administrator under the antitrust laws based upon his insistence that AEC include in

[2] In 1963, petitioner, which has distribution lines and associated facilities in 55 of the 67 counties of Alabama, sold 45 per cent of the wholesale power, and 65 per cent of the retail power, in Alabama. In that year, AEC sold 5 per cent of the wholesale electric power and .2 per cent of the retail electric power in Alabama. The additional facilities which the proposed REA loan will add to AEC's capacity will increase its proportional sales of wholesale and retail electric power in Alabama to 13 per cent and .23 per cent, respectively (R. 230–231).

[3] Petitioner also claimed below that the REA Administrator erroneously determined that "central station service" was not being supplied to the rural areas involved—a determination which is a prerequisite to the making of an REA loan under 7 U.S.C. 904 (R. 8–9). Petitioner apparently has abandoned that contention in this Court. Cf. note 11, *infra*.

its contracts with its members the requirement that for 35 years they purchase all of their power from it.

a. Official actions of government officers are not subject to injunction under the federal antitrust laws. In *Parker* v. *Brown*, 317 U.S. 341, a raisin producer sought to enjoin state officers from enforcing a California raisin marketing program on the ground, *inter alia*, that it violated the federal antitrust laws. This Court unanimously held that the antitrust laws are not directed at the action of a state or its officers, reasoning (*id.*, at 350, 352; emphasis added):

> [I]t is plain that the [raisin marketing] prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. *We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.* * * *
>
> * * * * * *
>
> The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as *an act of government which the Sherman Act did not undertake to prohibit.* * * *

A fortiori, if the valid action of state governments is not within the scope of the federal antitrust laws, the official action of *federal* officers is not subject to injunction under those laws. See *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533, 559–560; *United Mine*

Workers of America v. *Pennington*, 381 U.S. 657, 671–672.[4]

This conclusion is strongly supported by this Court's decision in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127. In that case, the plaintiffs claimed that the antitrust laws were violated by concerted efforts of American railroads to obtain enactment and enforcement of legislation harmful to American truckers. This Court unanimously rejected that contention, finding (*id.* at 137, n. 17) that it was "not unlike" the contention of antitrust violation by state officers in *Parker* v. *Brown*, *supra*. Reiterating its holdings in *Parker* v. *Brown*, the Court stated (365 U.S. at 135–136):

> It has been recognized * * * that the Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of "individuals or combinations of individuals or corporations." Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out [footnotes omitted].

b. Petitioner contends (*e.g.*, Pet. 10), however, that the REA Administrator's action is not outside the reach of the antitrust laws because he allegedly acted

[4] Obviously, the basis for the decision in *Parker* v. *Brown*, *supra*, is that the antitrust laws are directed at private actions only, so that governmental action within the scope of governmental authority, whether state or federal, is immune from those laws. States as such are not otherwise exempt from federal laws. See, *e.g.*, *California* v. *Taylor*, 353 U.S. 553, applying the Railway Labor Act to the California State Belt Railroad.

beyond his statutory authority in imposing the 35-year, "all-requirements" contracts.[5]

The REA was made a permanent agency of the federal government by the Rural Electrification Act of 1936, 49 Stat. 1363, 7 U.S.C. 901, *et seq.* The purpose of that legislation was to extend the benefits of central station electric power to rural areas without such power. See, *e.g.*, 80 Cong. Rec. 2752. The REA was directed to effectuate that purpose by making loans to finance the construction and operation of generating plants and electric transmission and distribution systems. 7 U.S.C. 901, 904. Such loans may only be made to those who will furnish electric energy to "persons in rural areas who are not receiving central station service * * *." 7 U.S.C. 904.

The Act authorizes the REA Administrator to make loans "on such terms and conditions relating to the expenditure of the moneys loaned and the security therefor as the Administrator shall determine * * *." 7 U.S.C. 904.[6] The statute specifies that such loans "shall

[5] In *Bankers Life and Casualty Co.* v. *Larson*, 257 F. 2d 377 (C.A. 5), certiorari denied, 358 U.S. 879 (Pet. 31), a state officer was required to defend on the merits an antitrust action for treble damages because the court found that the complaint, in that particular case, made specific allegations of misconduct by him beyond his official duties. In *Harman* v. *Valley National Bank of Arizona*, 339 F. 2d 564 (C.A. 9), the other treble damage suit cited by petitioner (Pet. 31), no governmental officer was a defendant.

[6] The legislative history of the Rural Electrification Act confirms the broad discretion which the statutory terms vest in the REA Administrator. See, *e.g.*, the reference by Representative Rayburn, sponsor of the House bill, to the "great power that was given to the Administrator" (80 Cong. Rec. 5281). See also the statement of Senator Norris, sponsor of the Senate bill, that "[w]e must give to the Administrator a very wide

be self-liquidating within a period of not to exceed thirty-five years," and shall bear two percent annual interest. *Ibid.*[7] The Act also provides that the Administrator may make no loans unless he "finds and certifies that in his judgment the security therefor is reasonably adequate and such loan will be repaid within the time agreed" and that before loans for the construction, operation, or enlargement of generating plants may be made, the consent of the State authority having jurisdiction over such plants must be obtained. *Ibid.* Moreover, the Administrator must annually make to Congress a full report of REA's loan activities. 7 U.S.C. 910.

The "all-requirements" provision, which the REA Administrator has required as a condition of the loan to AEC, reflects the fact that the cost of constructing a generating plant and rural electric distribution system would, in general, be too high to be absorbed by a single cooperative. As Senator Norris stated during the original debates of the Act, "It would not be good busi-

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discretion in carrying out the plan I have just suggested. We cannot lay down a hard and fast rule * * *" (80 Cong. Rec. 2759). Senator Norris also stated (80 Cong. Rec. 3308):

> * * * in this proposed legislation we are giving, and we necessarily must give, if we are going to make a success of the measure, in my opinion, almost unlimited discretion, something that under ordinary circumstances I do not like to do. But if the Administrator, whoever he may be, carrying out this proposed law is not at heart converted to the idea embodied in it, namely, to extend the blessings of electricity to the farmers of America, he could easily wreck this whole program and still be technically in the right.

[7] A 1944 amendment increased the self-liquidating period from 25 to 35 years, and changed the rate of interest. 58 Stat. 739.

ness to build a generating system for a single farmers' organization. The expense in such a case would be too high, so that it would not be a self-liquidating proposition. But one generating system may supply half a dozen or a dozen farm organizations * * *." 80 Cong. Rec. 2756. As early as 1938, in order to overcome the lack of feasibility in REA loans to single distribution systems, several of such systems were combined into federated cooperatives such as AEC. Under this plan, the federated cooperatives received REA loans for the construction of a single generating plant and transmission lines designed to supply the member distribution systems with wholesale power which they, in turn, would distribute to their member-consumers.

While the REA loans were made to the federated cooperatives, the individual distribution systems were the member-owners and exercised complete control over the management of the cooperatives; and the REA loans were, in fact, made for the benefit of each of the member distribution systems and their consumers (see Pet. App. 8a). Thus, almost from the inception of the REA program, REA Administrators have consistently insisted that the contracts between the cooperatives and the individual distribution systems contain a provision requiring the distribution systems to purchase their wholesale power requirements from the cooperative during the period of the loan from REA to the cooperative.[8] In short, one

[8] The contracts between the federated cooperatives and their members are for forty-year periods, *i.e.*, the 35-year period of the REA loans plus the additional time necessary for construction of the generating plant and transmission lines.

purpose of the 35-year "all-requirements" provision is to assure REA that each of the distribution systems wants the loan to be made and intends to use its share of the power capacity which the loan would create. Moreover, it has been the consistent view of the REA Administrators that "all-requirements" provisions in contracts between federated cooperatives and their members constitute the principal security and source of repayment of the REA loans to the federated cooperatives (see Pet. App. 7a–9a).[9]

This long-established practice of REA Administrators of requiring "all-requirements" provisions in loan contracts has, for many years, been made known to and acquiesced in by Congress. For example, the complete text of a representative "all-requirements" contract between a federated cooperative and its member distribution systems was inserted into the record of the Hearings before the Senate Subcommittee of the Committee on Appropriations, *Agricultural Appropriations for 1951,* 81st Cong., 2d Sess., pp. 1409–1413 (March 21, 1950). The "all-requirements" arrangements were fully explained by REA during those Hearings (*id.* at 1342 *et seq.*), following which the Conference Committee, in reporting on the agricultural appropriations, stated: "In addition, the Rural Electrification Administration is expected to exercise

[9] At the present time, REA has outstanding approximately one billion dollars in loans to 45 federated cooperatives owning electric generating and distribution facilities in 23 states, which supply wholesale power to about 400 REA-financed rural electric distribution borrowers, whose indebtedness to REA aggregrates approximately another billion dollars.

its power generation authority only in line with its announced policy and the law." H. Rep. No. 2991, 81st Cong., 2d Sess., p. 32. While Congress has long maintained a close scrutiny of the REA policy and practices,[10] so far as we are aware it has never challenged the "all-requirements" provisions.

2. The foregoing discussion demonstrates: (1) that the purpose of the REA Act was to provide loans to stimulate rural electrification; (2) that the Act vests the REA Administrator with broad authority to set terms and conditions for the expenditure of moneys and the security of loans (7 U.S.C. 904); and (3) that the customary and long-established practice of REA Administrators to condition loans upon the making of "all-requirements" contracts was undertaken pursuant to that authority[11] and with the acquiescence

[10] See, *e.g.*, the very extensive examination of REA's generating and transmission loan program which was undertaken by the Appropriation Committees of both Houses in 1963. H. Rep. No. 355, 88th Cong., 1st Sess., pp. 7–8, 35–36; S. Rep. No. 497, 88th Cong., 1st Sess., pp. 27–29.

[11] There are several answers to the contention (Pet. 8) that the REA Administrator acted outside of his authority by making loans for the benefit of persons who were already receiving "central station service" (see 7 U.S.C. 904).

First, it is difficult to see the relevance of the "central station service" restriction to the question whether petitioner may challenge under the antitrust laws the Administrators' insistence upon the 35-year "all-requirements" contracts. Whether particular governmental action comes within the ambit of the antitrust laws depends upon whether *that action*—and not some other action—was within the official's authority.

Second, it has long been settled that a private power company has no standing to challenge the action of the REA Administrator in approving loans where the basis for the challenge is simply that the Administrator has failed to follow the "central station service" restriction in 7 U.S.C. 904. See *Kansas City*

of Congress. In these specific circumstances neither the REA Administrator's imposition of the 35-year requirement in his contract with AEC nor the latter's inclusion of the provision in its contracts with its members violates the antitrust laws.[12] Although AEC and its members are independent entities, realistically the Ad-

Power & Light Co. v. *McKay*, 225 F. 2d 924 (C.A.D.C.), certiorari denied, 350 U.S. 884; *Rural Electrification Admin.* v. *Central Louisiana Elec. Co.*, 354 F. 2d 859 (C.A. 5), certiorari denied, 385 U.S. 815. The continuing vitality of the *McKay* decision was specifically recognized in *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 7, n. 7.

Third, even if petitioner had standing to urge that the REA Administrator acted beyond his authority because of a violation of the "central station service" restriction and even if this point is relevant to the antitrust contentions, there would still be no basis for holding that the Administrator acted beyond his statutory authority. The Administrator has authority to make loans and to determine whether the statutory requirements for the making of such loans have been met—*e.g.*, whether the loan is for the purpose of bringing "central station service" to unserved persons in rural areas. 7 U.S.C. 904. The most that petitioner can say is that the Administrator erroneously determined, in the particular case, that "central station service" was not being supplied. But administrative officials do not act outside their statutory bounds simply because their determinations are erroneous. See, *e.g.*, *Barr* v. *Matteo*, 360 U.S. 564; *Schilling* v. *Rogers*, 363 U.S. 666, 676–677.

Fourth, the REA Administrator has consistently taken the position in cases such as this that the "central station service" provision prevented only the substitution of REA-financed service for existing service but did not prevent financing to benefit those who, though already served, received service for the first time through REA-financed facilities (R. 224–225, 249–252). See *Kansas City Power & Light Co.* v. *McKay*, 115 F. Supp. 402, vacated on other grounds, 225 F. 2d 924 (C.A.D.C.). See, also, *Comptroller General, Report to the Congress of the United States on REA* (1963).

[12] The official governmental character of the REA Administrator's action is not obviated because the petitioner in its complaint

ministrator's imposition of the 35-year requirement and the implementation thereof by AEC and its members are integrated parts of a single transaction between the government on the one hand and AEC and its members on the other.

Of course, transactions among private persons may violate the antitrust laws even though they implement or are pursuant to a contract that one of such persons has with the government, or are entered into pursuant to some governmental directive. See *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690; *United Mine Workers* v. *Pennington, supra,* 381 U.S. at 671, n. 4. Whether the antitrust laws apply to such private transactions depends upon the latter's role in effectuating a particular statutory and regulatory scheme; as shown above, the specific design of the REA Act shows that the 35-year requirement here is necessary to effectuate the purposes of that Act and, therefore, it cannot be challenged under the antitrust laws.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1968.

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characterized the Administrator's conduct as part of a "conspiracy." See, *e.g.*, *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F. 2d 52, 56 (C.A. 1), certiorari denied, 385 U.S. 947.

U.S. GOVERNMENT PRINTING OFFICE: 1968